

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 7, 2009

ROBERT P. WALZ v. PHIL MITCHELL

Appeal from the Chancery Court for Roane County
No. 15902 Frank V. Williams, III, Chancellor

No. E2008-00349-COA-R3-CV - FILED APRIL 21, 2009

In August 2002, Robert P. Walz ("Plaintiff") obtained a judgment for \$5,097.50 against Phil Mitchell ("Defendant") in Monroe County, Florida. In August of 2007, Plaintiff filed a complaint in the Roane County Chancery Court seeking to enforce the Florida judgment. Defendant, proceeding pro se, responded to the complaint and filed a counterclaim for defamation and damage to business reputation. Plaintiff filed a motion to dismiss the counterclaim on the basis that the Trial Court lacked subject matter jurisdiction. The Trial Court agreed and granted Plaintiff's motion. Nine days before trial, Defendant filed a motion for a continuance claiming he needed additional time to conduct discovery. The Trial Court denied the motion for continuance and, following a trial, entered an order enforcing the Florida Judgment. Defendant appeals, and we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. McCLARTY, J., joined.

Phil Mitchell, pro se Appellant.

Greg Leffew, Rockwood, Tennessee, for the Appellee, Robert P. Walz.

MEMORANDUM OPINION¹

Background

Plaintiff filed a complaint in the Roane County Chancery Court seeking to enforce a foreign judgment that he received against Defendant in the State of Florida. The amount of the Florida judgment was \$5,097.50. The Florida judgment was entered in August 2002, and provided for post-judgment interest at the rate of 9%. Plaintiff filed his complaint to enforce the Florida judgment pursuant to Tennessee's Uniform Enforcement of Foreign Judgments Act, Tenn. Code Ann. § 26-6-101, *et seq.*

Defendant, proceeding pro se, answered the complaint and denied the pertinent allegations contained therein. Defendant also filed a counterclaim for harassment and defamation. Essentially, Defendant claimed that the purpose of the original lawsuit was to harass Defendant and that by seeking to enforce the Florida judgment in Tennessee, Plaintiff was damaging Defendant's business reputation in Roane County.

Plaintiff filed a motion to dismiss the counterclaim, asserting that the Chancery Court did not have subject matter jurisdiction over the claims made in the counterclaim as Defendant was asking for unliquidated damages for injury to his person or character. The motion was set for hearing on December 6, 2007. Prior to the hearing, Defendant sent a letter to Plaintiff's counsel stating that he needed more time to prepare for the December hearing. Defendant did not, however, file a motion for a continuance with the Trial Court. Because no motion for a continuance was filed, the hearing proceeded as scheduled. Defendant did not show up for the hearing. Plaintiff's counsel did not agree to a continuance but did inform the Trial Court of Defendant's letter. Following the hearing, the Trial Court entered an order stating as follows:

The Court finds that the Defendant, Phil Mitchell, received notice of this hearing, but has failed to appear. The Court further finds that Defendant Mitchell mailed to Plaintiff's attorney a letter dated December 2, 2007, stating that Defendant Mitchell needed more time to prepare for this hearing. The Court further finds that Plaintiff's attorney has not agreed to a continuance of this hearing. The Court further finds that Plaintiff's notice of motion complies with Rule 6 of the Tennessee Rules of Civil Procedure, and Defendant Mitchell has not filed a motion for a continuance, nor has Defendant Mitchell appeared and asked this Court for a continuance.

¹ Rule 10 of the Rules of the Court of Appeals provides: "This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated 'MEMORANDUM OPINION,' shall not be published, and shall not be cited or relied on for any reason in any unrelated case."

The Court further finds that Defendant Mitchell's counter-complaint against Plaintiff, Robert P. Walz, alleges causes of action pertaining to defamation of character, harassment and fraud. Because these causes of action are for unliquidated damages for injury to person or character, the proper place to bring those causes of action is Circuit Court.

Therefore, the Court ORDERS, ADJUDGES and DECREES that the counter-complaint of the Defendant, Phil Mitchell, is hereby dismissed without prejudice, because the appropriate forum for those causes of action is the Circuit Court.

On January 4, 2008, the parties were notified by the Clerk and Master that the case was set for trial on February 15, 2008.² Nine days before trial, Defendant filed a motion for continuance stating that he needed additional time for discovery and to "prepare my case." On the day of trial, the Trial Court first considered Defendant's motion for a continuance, eventually denying that motion. The trial then took place as scheduled. Following the trial, the Trial Court entered two orders, one which disposed of the pending motions, and one which disposed of the issues at trial. The first order disposing of the motions provides, in pertinent part, as follows:

This cause came on to be further heard upon the motion of Defendant Mitchell for a continuance [filed February 6, 2008], whereupon the Court finds that Defendant Mitchell was served with process in this cause on August 22, 2007, and that the February 15, 2008 trial date was scheduled four (4) months ago at the Court's last docket sounding. The Court further finds that Defendant Mitchell has had sufficient time to prepare his case, to request discovery, and to present additional motions he deems pertinent to this case, as well as other matters set forth in his motion. Further, the Court finds that Defendant Mitchell did not initiate any request for discovery until February 5, 2008, when he mailed a set of interrogatories to Plaintiff's Counsel. . . . Defendant Mitchell's motion for a continuance is denied. . . .

In the second order which resolved the issues presented at trial, the Trial Court found that the requirements of the Uniform Enforcement of Foreign Judgments Act had been met and the Florida judgment was entitled to enforcement. The Trial Court further noted that Defendant did not raise a collateral attack on the validity of the Florida judgment, and "chose not to present any proof or present any testimony in this Court at the hearing on this cause."

² Although the notice was sent by the Clerk and Master in January 2008, the case actually was set for trial several months earlier at the Chancery Court's docket sounding.

Defendant appeals the Trial Court's final judgment. Defendant's brief does not contain a Statement of the Issues as required by Tenn. R. App. P. 27(a)(4), and it is difficult to tell from his brief what issues he wishes to raise. It appears that Defendant is arguing: (1) that the Trial Court erred when it denied his motion for a continuance; (2) that the Trial Court erred when it dismissed his counterclaim based on lack of subject matter jurisdiction; and (3) that the Trial Court erred when it enforced the Florida judgment.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first will address whether the Trial Court erred when it failed to grant Defendant's motion for a continuance. In *Sanjines v. Ortwein and Assocs., Inc.*, 984 S.W.2d 907 (Tenn. 1998), our Supreme Court explained that a trial court's decision to grant or deny a request for a continuance is a matter:

entrusted to the sound discretion of the trial judge. *See Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 415 (Tenn. 1997). An appellate court cannot interfere with the trial court's decision unless such decision constitutes an abuse of discretion and causes prejudice to the party seeking the stay or continuance. *Id.*; *see also Rachels v. Steele*, 633 S.W.2d 473, 475 (Tenn. App. 1981).

Sanjines, 984 S.W.2d at 909.

Our Supreme Court further discussed the abuse of discretion standard in *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001), stating:

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge, 42 S.W.3d at 85.

The Trial Court denied Defendant's motion for a continuance because it concluded that Defendant had sufficient time between when the case was filed and the trial date within which to conduct discovery. The Trial Court also took note of the fact that the case had been set for trial for approximately four months, but Defendant waited until just nine days before trial to begin the discovery process and request additional time. On appeal, Defendant fails to offer any explanation as to why these conclusions by the Trial Court were in error. While Defendant claims he should have been given more time, he fails to set forth any competent proof as to why he did not have sufficient time after the case was filed and before the trial date in which to conduct any necessary discovery. The very most we possibly could conclude from this record is that reasonable minds could differ on this issue. Accordingly, Defendant has failed to establish that the Trial Court abused its discretion when it denied his motion for a continuance.

The next issue is Defendant's claim that the Trial Court erred when it dismissed his counterclaim based on lack of subject matter jurisdiction. All Defendant states with regard to this issue is that the Trial Court was incorrect. Defendant does not explain why he contends the Trial Court was incorrect. Defendant does not argue that the Trial Court actually did have subject matter jurisdiction, and Defendant does not cite any authority in support of such a proposition. In *Bean v. Bean*, 40 S.W.3d 52 (Tenn. Ct. App. 2000) we observed:

Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue. *See State v. Schaller*, 975 S.W.2d 313, 318 (Tenn. Crim. App. 1997); *Rampy v. ICI Acrylics, Inc.* 898 S.W.2d 196, 210 (Tenn. Ct. App. 1994); *State v. Dickerson*, 885 S.W.2d 90, 93 (Tenn. Crim. App. 1993). Moreover, an issue is waived where it is simply raised without any argument regarding its merits. *See Blair v. Badenhope*, 940 S.W.2d 575, 576-577 (Tenn. Ct. App. 1996); *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 86 (Tenn. Ct. App. 1988). . . . This Court is under no duty to verify unsupported allegations in a party's brief, or for that matter consider issues raised but not argued in the brief. *Duchow v. Whalen*, 872 S.W.2d 692, 693 (Tenn. Ct. App. 1993) (citing *Airline Const. Inc., v. Barr*, 807 S.W.2d 247 (Tenn. Ct. App. 1990)).

Bean, 40 S.W.3d at 55-56. Because Defendant does no more than state his conclusion that the Trial Court was wrong without offering any argument or authority explaining why or how error was committed, we consider this issue waived in accordance with *Bean*.

Defendant's final issue is his claim that the Trial Court erred when it enforced the Florida judgment. As with the previous issue, Defendant offers nothing in support of this argument. Defendant does not explain why he claims that the Trial Court's finding was incorrect, and he offers no authority in support of such a claim. Defendant does not mention the Uniform Enforcement of

Foreign Judgments Act or argue that the Trial Court incorrectly found that Plaintiff had complied with the requirements of that Act. As with the previous issue, we also find this issue waived.

While Defendant offers very little in support of his claims that the Trial Court erred, he does claim that we should overlook any deficiencies in his arguments due to the fact that he is proceeding pro se. As this Court explained in *Young v. Barrow*:

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000); *Paehler v. Union Planters Nat'l Bank, Inc.*, 971 S.W.2d 393, 396 (Tenn. Ct. App. 1997). The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. *Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tenn. Ct. App. 1988). However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe. *Edmundson v. Pratt*, 945 S.W.2d 754, 755 (Tenn. Ct. App. 1996); *Kaylor v. Bradley*, 912 S.W.2d 728, 733 n.4 (Tenn. Ct. App. 1995).

Young v. Barrow, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003).

We are not unmindful of Defendant's pro se status and have attempted to give him the benefit of the doubt whenever possible. Nevertheless, we cannot write Defendant's brief for him, and we are not able to create arguments where none otherwise exist. Likewise, we will not dig through the record in an attempt to discover arguments that Defendant may have made had he been represented by counsel. To do so would place Plaintiff in a distinct and likely insurmountable and unfair disadvantage as this Court would be acting as Defendant's attorney.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to Chancery Court for Roane County solely for the collection of costs below. Costs on appeal are taxed to the Appellant, Phil Mitchell, and his surety, if any.

D. MICHAEL SWINEY, JUDGE